

Bob Maddox Plymouth, Inc. and Sidney M. Page.
Case 10-CA-14079

June 22, 1981

SUPPLEMENTAL DECISION AND ORDER

On February 18, 1981, Administrative Law Judge J. Pargen Robertson issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in support thereof.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, but not to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bob Maddox Plymouth, Inc., Forest Park, Georgia, its officers, agents, successors, and assigns, shall pay the following employees the sums of net backpay shown opposite their names, together with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977),³ less any tax withholding required by law.

Sidney M. Page	\$ 4,269.81
John E. Waters	16,499.89

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In computing the amount of backpay to which John E. Waters is entitled, the Administrative Law Judge found that Waters received \$2,510.90 in gross interim earnings from Boyd's Body Shop during the first quarter of 1979. The record reveals, however, that Waters received nine payments from Boyd's Body Shop totaling \$2,807.90. Accordingly, we will issue an Order in lieu of that recommended by the Administrative Law Judge reducing the backpay owed to Waters by \$297, from \$16,796.89 to \$16,499.89.

³ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

SUPPLEMENTAL DECISION IN BACKPAY PROCEEDINGS

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This supplemental proceeding to determine the amount of backpay due two employees, whose employment has previously been found to have been discriminatorily terminated,¹ was heard before me on November 19, 1980, in Atlanta, Georgia, on the specifications of the General Counsel issued on October 27, 1980, as amended at the hearing, and the answer of Respondent.

Upon the record made before me and my observation of the demeanor of the witnesses, and after carefully considering briefs filed by the General Counsel and Respondent, I make the following:

By Administrative Law Judge Claude R. Wolfe's June 4, 1979, Decision, Respondent was found to have discriminatorily discharged employees Sidney M. Page and John E. Waters on October 11, 1978. The parties were in agreement that Respondent offered reinstatement to both Page and Waters by letter dated June 8, 1979. Moreover, the facts are not in dispute that Page and Waters were actually reinstated on July 5, 1979.

Although the General Counsel argues that the backpay period, as to both Page and Waters, runs from October 11, 1978, to the date of actual reinstatement, July 5, 1979, he concedes that Page's calendar quarter interim earnings exceeded his calendar quarter gross backpay after January 2, 1979. Therefore, as to Page, the General Counsel seeks backpay for the fourth quarter of 1978. In its specifications, as amended at the hearing, the General Counsel seeks backpay for Waters for the fourth quarter of 1978 and quarters one and two of 1979.

Respondent contends that the backpay periods should terminate on June 8, 1979, when it extended reinstatement offers.

Both Page and Waters testified without rebuttal that they were involved in completing work as subcontractors on June 8, 1979. Each testified that he returned to work with Respondent on July 5, 1979, when he completed that work. In view of my finding herein that the particular work in process generated interim earnings and in view of there being no evidence demonstrating that the period from June 8 to July 5 was unreasonable, I conclude that the backpay period extends to the date of actual reinstatement—July 5, 1979.²

In its answer Respondent argued that Waters was offered reinstatement on the day following his discharge. The General Counsel argued that matter was specifically considered and was *res judicata* in view of the findings of Administrative Law Judge Wolfe. However, at the hearing Respondent stated that it was unable to offer proof that Waters was offered reinstatement on October 12. Therefore, that matter is not in issue.

Respondent did not contest the General Counsel's method of computing the discriminatees' alleged gross backpay. As amended at the hearing, the General Counsel conceded that both Page and Waters' gross backpay for the fourth quarter of 1978 would be 11.4 (number of weeks in that quarter after their October 11 discharge) times each discriminatee's average weekly earnings in-

¹ JD-360-79 adopted by the National Labor Relations Board by Order dated July 16, 1979, and enforced by Order of United States Court of Appeals for the Fifth Circuit on June 20, 1980.

² See *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973).

stead of 12 weeks as reflected in the specification.³ Respondent admitted that the average weekly earnings were \$520.42 for Page and \$552.77 for Waters.

The General Counsel contended through the specifications that both Page and Waters were entitled to additional wages as "Christmas Club Bonus." Respondent contests the discriminatees' entitlement to those amounts. However, un rebutted evidence through the testimony of both Page and Waters proved that both contributed to the Christmas club up to the time of their discharge at a rate of \$2.50 per week. Respondent, in accord with its Christmas club program, matched the amount of each employee's contribution. Both Page and Waters testified that they would have continued to contribute to the Christmas fund if they had not been terminated. I find that each is entitled to receive an amount equal to what Respondent's Christmas club contribution would have been had each continued working during the backpay period.⁴

At the hearing other issues arose which I will now treat as to each discriminatee.

1. *Sidney M. Page*: The backpay specification alleged that Page received no interim earnings in the fourth quarter of 1978 and that his expenses in the search for work totaled \$47. Page was called by the General Counsel, and he testified that he sought work during October, November, and December, 1978 with some 12 specified employers. Page testified that he also sought work through the local Employment Security office.

However, on cross, Page admitted that he received pay for work performed as Sidney Page Body Shop during the fourth quarter of 1978. Page also admitted that he was untruthful to both Employment Security and the Internal Revenue Service by not reporting those fourth quarter earnings. In view of those admitted misrepresentations, I am unable to credit Page's testimony to the extent it conflicts with other evidence. Therefore, I have credited other evidence showing that Page did not seek employment at "Stewart Avenue Chrysler-Plymouth" during the fourth quarter as he claimed in his testimony.

However, Page's testimony that he sought employment through the Employment Security office and with 11 other employers during the fourth quarter was un rebutted.⁵ That evidence convinces me that Page did

engage in a reasonably diligent search for employment. (See *Cornwell Company, Inc.*, 171 NLRB 342 (1968).)

However, Respondent did offer credible evidence that Page was paid some \$1,765.68 for work performed for Sam Dell's Dodge during the fourth quarter 1978. The testimony reflected that that sum was paid Page for work performed in a subcontract basis for Sam Dell's Dodge. The evidence indicated those payments represent a gross figure. In that regard, Page testified he estimated his net earnings to be \$900. However, no effort was made to support Page's alleged overhead—the difference between \$1,765.68 and \$900. On that basis, I am unable to conclude that the entire amount did not constitute interim earnings. Therefore, I find that Page received interim earnings in the amount of \$1,765.68 during the fourth quarter of 1978.

I have computed Page's entitlement as follows:

Fourth Quarter 1978:⁶

Gross Backpay	\$5,932.79
Less Interim Earnings	1,765.68
Plus Expenses	
—Seeking Employment	42.20
Plus Christmas Club Bonus	60.50 ⁷
Total	\$4,269.81

2. *John E. Waters*: Respondent also contends that John Waters should be discredited. Some of Waters' testimony was contested. He testified that he applied for work at the Employment Security office and with nine employers during the fourth quarter of 1978. Waters testified that he applied for work during that period at Stewart Avenue Chrysler-Plymouth. On direct, he was asked who he spoke to at Stewart Avenue Chrysler-Plymouth. Waters testified, "I believe his name was Mr. Billy Cook." On cross, Waters was asked who did he see when he applied at Stewart Avenue. He replied, "Stewart Avenue Chrysler-Plymouth? Billy Cook." He identified Billy Cook as the shop foreman. Respondent subsequently called Tommy Durden who testified that he was the shop foreman at Stewart Avenue Chrysler-Plymouth during the fall of 1978 and that Billy Cook was not employed there after September 9, 1978. Durden also testified that he did not recall Waters applying for work at Stewart Avenue Chrysler-Plymouth. Durden did admit on cross that it was possible Waters did apply and that he did not see him.

As to the other employers, Page named all the places where he allegedly sought work. That provided Respondent with the elements necessary to investigate his testimony. Nevertheless, no rebuttal evidence was offered. Under those circumstances, I am unable to discredit his un rebutted testimony.

⁶ In computing Page's expenses seeking employment I have not included his claimed mileage to Stewart Avenue Chrysler-Plymouth for reasons explained above. I computed other mileage in search of work including mileage for weekly trips to the Employment Security office. The formula I used for computing the following are: (a) gross backpay (11.4 weeks x \$520.42), (b) expenses seeking employment (422 miles x 10¢), and (c) Christmas club bonus (\$32 + (11.4 x \$2.50)).

⁷ Page was refunded his \$32 contribution to the Christmas club on his discharge. Under the Christmas club program, Respondent would have matched that \$32 plus the additional \$28.50 Page would have contributed had he continued working the remaining 11.4 weeks in 1978.

³ Respondent did question the General Counsel's arithmetic when, at the hearing, the General Counsel amended the specification to show that Waters' fourth quarter 1978 entitlement should be reduced from 12 weeks to 11.4 weeks. According to the General Counsel's amendment, Waters' gross backpay, reflected on Appendix B, increased from \$6,080.47 to \$6,302. The General Counsel pointed out that the original figure (\$6,080.47) represented an arithmetic mistake.

⁴ In its backpay specification the General Counsel limited the Christmas club entitlement to the fourth quarter of 1978 as to both Page and Waters. However, in its brief the General Counsel argued that that entitlement should extend throughout the entire backpay period. However, I note, as to Page, the specification admits that his calendar quarter interim earnings exceeded his calendar quarter gross backpay after January 2, 1979. There is no showing that this admission would not remain operative even if Page's Christmas club entitlement was added to his calendar quarter gross backpay after January 2, 1980. Therefore, I find that the record does not indicate that Page is entitled to backpay in any form beyond the date of January 2, 1979.

⁵ Even though Page's admissions cast doubt on his overall credibility, other evidence proved that Page did apply with the Employment Security

Under those circumstances, I am unable to credit Waters' testimony that he applied for work at Stewart Avenue Chrysler-Plymouth. However, unlike the circumstances surrounding Sidney Page's testimony, it does not appear that Waters was deliberately misrepresenting facts. In other respects Waters' testimony proved to be in line with other evidence.

The facts clearly establish that Waters sought work through the Employment Security office around October 13, 1978. In the absence of conflicting evidence, I find that he also sought work with some eight other employers during the fourth quarter 1978. Therefore, I find that Waters did engage in a reasonably diligent search for employment.⁸

The backpay specification, as amended, alleges that Waters' interim earnings during the first two quarters of 1979 totaled \$1,466.88 and \$2,405.18, respectively. The evidence proved that Waters' interim earnings were received from Boyd's Body Shop in a subcontractor capacity. Boyd, the operator of Boyd's Body Shop, was called by Respondent. Boyd testified that he paid Waters \$2,510.90 in the first quarter and \$2,695.21 in the second quarter of 1979.⁹

Boyd's testimony showed that the above amounts represented gross figures and that Waters was responsible for his own overhead. The only evidence offered regarding overhead, other than evidence regarding excess mileage, was Waters' testimony that he paid rent in the total amount of \$1,042 for the months of March through June 1979 for space necessary to perform the subcontract body work for Boyd's Body Shop.¹⁰ That rent repre-

sented payments of \$260.50 for each of the 4 months. Waters' testimony established that those rent payments should be deducted from his gross receipts from Boyd's Body Shop.

I have computed Waters' entitlement as follows.¹¹ [Computations¹² omitted from publication.]¹³

Recommendations

On the basis of the foregoing findings of fact, conclusions, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, there is hereby issued the following recommended:

ORDER¹⁴

The Respondent, Bob Maddox Plymouth, Inc., Forest Park, Georgia, its officers, agents, successors, and assigns, shall pay to each of the individuals listed below the amount set opposite their names. Interest is to be added as established in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁵ There shall be deducted from the amounts due each individual any tax withholding required by law.

Sidney M. Page	\$4,269.81
John E. Waters	16,796.89

sence of such a motion, I shall not reject the evidence regarding rental payments.

¹¹ In computing Waters' expenses I have not included his claimed mileage to Stewart Avenue Chrysler-Plymouth for reasons explained above. I computed other mileage in search of work including weekly trips to the Employment Security office.

¹² Waters was refunded his \$97.50 contribution to the Christmas club upon his discharge. Under the Christmas club program, Respondent would have matched that \$97.50 plus the additional \$28.50 Waters would have contributed had he continued working the remaining 11.4 weeks in 1978.

¹³ Waters testified that he drove some 8 miles to work at Boyd's Body Shop and that when working for Respondent he drove 4 to 5 miles. Therefore, he drove an additional 3 miles to work each day (total of 6 miles per day).

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁸ The evidence, including his own testimony, reflected that Waters actually worked during the remaining quarters of the backpay period. Therefore, I draw no adverse conclusions as to whether he sought employment during 1979. *Cornwell Company, supra*.

⁹ Boyd testified that for two of the payments in the amounts of \$352.70 and \$344.80, for the second quarter, he has not received canceled checks. However, in the absence of other evidence showing that Waters did not receive those payments, I credit the evidence showing those payments were made.

¹⁰ Respondent contested the General Counsel's rebuttal evidence regarding Waters' rental expenses. I overruled Respondent's objection at the hearing. I also denied Respondent's request for a continuance to investigate Waters' rental expenses. However, I informed Respondent on the record that I would consider a motion to reopen the record in the event his investigation brought those expenses into question. In the ab-